Supreme Court, U.S.
FILED

No. 09-091344 MAR 29 2010

OFFICE OF THE CLERK
In The William K. Suter, Clerk

Supreme Court of the United States

RICHARD M. FISCHER,

Petitioner,

vs.

STATE OF WISCONSIN,

Respondent.

On Petition For A Writ Of Certiorari To The Wisconsin Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May a state overcome an accused's Sixth and Fourteenth Amendment rights to present a defense resting on reliable evidence of innocence on the ground that it has a compelling interest in successfully investigating and prosecuting drunk drivers?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Richard M. Fischer prays that a writ of certiorari issue to review the judgment of the Wisconsin Supreme Court below.

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court appears at App. 1 to this Petition and is found at 2010 WI 6, 778 N.W.2d 629.

The opinion of the Wisconsin Court of Appeals appears at App. 38 to this Petition and is found at 2008 WI App. 152, 314 Wis. 2d 324, 761 N.W.2d 7.

JURISDICTION

The Wisconsin Supreme Court affirmed Petitioner's conviction on February 2, 2010. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor,

and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

WISCONSIN STATUTES

VEHICLES – GENERAL PROVISIONS
WIS. STAT. § 340.01 (2009)

340.01. Words and phrases defined.

> (46m) "Prohibited alcohol concentration" means one of the following: (a) If the person has 2 or fewer prior convictions, suspensions, or revocations, as counted under s. 343.307(1), an alcohol concentration of 0.08 or more.

VEHICLES
WIS. STAT. § 343.303 (2009)

343.303. Preliminary breath screening test.

> If a law enforcement officer has probable cause to believe that the person is violating or has violated s. 346.63(1) or (2m) or a local ordinance in conformity therewith, or s. 346.63(2) or (6) or 940.25 or s. 940.09 where the offense involved the use of a vehicle, or if

the officer detects any presence of alcohol, a controlled substance, controlled substance analog or other drug, or a combination thereof, on a person driving or operating or on duty time with respect to a commercial motor vehicle or has reason to believe that the person is violating or has violated s. 346.63(7) or a local ordinance in conformity therewith, the officer, prior to an arrest, may request the person to provide a sample of his or her breath for a preliminary breath screening test using a device approved by the department for this purpose. The result of this preliminary breath screening test may be used by the law enforcement officer for the purpose of deciding whether or not the person shall be arrested for a violation of s. 346.63(1), (2m), (5) or (7) or a local ordinance in conformity therewith, or s. 346.63(2) or (6), 940.09(1) or 940.25 and whether or not to require or request chemical tests as authorized under s. 343.305(3). The result of the preliminary breath screening test shall not be admissible in any action or proceeding except to show probable cause for an arrest, if the arrest is challenged, or to prove that a chemical test was properly required or requested of a person under s. 343.305(3). Following the screening test, additional tests may be required or requested of the driver under s. 343.305(3). The general penalty provision under s. 939.61(1) does not apply to a refusal to take a preliminary breath screening test.

RECKLESS AND DRUNKEN DRIVING
WIS. STAT. § 346.63 (2009)

346.63. Operating under influence of intoxicant or other drug.

(1) No person may drive or operate a motor vehicle while:

(a) Under the influence of an intoxicant . . . to a degree which renders him or her incapable of safely driving. . . . [OWI]

(b) The person has a prohibited alcohol concentration. [PAC]

(c) A person may be charged with and a prosecutor may proceed upon a complaint based upon a violation of any combination of par. (a), (am), or (b) for acts arising out of the same incident or occurrence. If the person is charged with violating any combination of par. (a), (am), or (b), the offenses shall be joined. If the person is found guilty of any combination of par. (a), (am), or (b) for acts arising out of the same incident or occurrence, there shall be a single conviction for purposes of sentencing and for purposes of counting convictions under ss. 343.30(1q) and 343.305. Paragraphs (a), (am), and (b) each require proof of a fact for conviction which the others do not require.

EVIDENCE OPINIONS AND EXPERT TESTIMONY
WIS. STAT. § 907.02 (2009)

907.02. Testimony by experts.

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

WIS. STAT. § 907.03 (2009)

907.03. Bases of opinion testimony by experts.

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

STATEMENT OF THE CASE

In 2005, Petitioner faced criminal charges of drunk driving, as a second offense, in a Wisconsin state court. Count 1 of the amended criminal complaint alleged that Petitioner operated a motor vehicle on a highway while under the influence of an intoxicant (OWI). R3. That charge required proof of

impairment, but not of any specific blood alcohol content. WIS. STAT. § 346.63(1)(a).[1] Count 2 alleged that Petitioner operated the motor vehicle "with a prohibited alcohol concentration of .08 or more, to wit: did have a blood alcohol level of .147," contrary to WIS. STAT. § 346.63(1)(b) (PAC). R3.

Before trial, Petitioner asserted a right to call a defense expert on the issue of his blood alcohol concentration at the time of driving. The defense expert opined that Petitioner's blood alcohol concentration was below the legal threshold of .08% at the time of driving. R61, R62, R63. In developing curves reflecting Petitioner's blood alcohol concentration at the time of driving, the expert used the results of the Preliminary Breath Test (PBT) as one of the mathematical constraints or bases of his opinion. A police officer had administered the PBT at roadside to Petitioner.

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[1] The proof of blood alcohol concentration at or above 0.08% is critical to conviction on both of the charges of which Petitioner was convicted. This evidence proves an element of the crime of driving with a prohibited alcohol concentration (PAC) and is prima facie evidence of being under the influence of an intoxicant in an OWI prosecution. WIS. STAT. §885.235(1g)(c). App. 33 n.2, ¶ 38. A concurring opinion in the Wisconsin Supreme Court observed:

> In contrast, in OWI and PAC cases, proving a specific alcohol concentration is often a hotly contested issue; a specific alcohol concentration is an element of the crime and serves as statutorily relevant or prima facie evidence of an element of the crime (OWI). App. 32-33 ¶ 38 (Ziegler, J., concurring) (footnotes omitted).

The prosecution moved *in limine* to exclude testimony by Petitioner's expert to the extent that he relied at all on the PBT results. R27. The prosecution invoked a Wisconsin statute excluding PBT results from evidence "in any [drunk driving] action or proceeding" except to show probable cause for the arrest, if the accused later challenges the arrest. WIS. STAT. § 343.303. The prosecution reasoned that the defense expert could not therefore use the PBT results in his calculations.

Petitioner responded that an interpretation of WIS. STAT. § 343.303 to exclude his expert's testimony would deprive Petitioner of the right to present a defense, guaranteed by the Fifth, Sixth and Fourteenth Amendments. R32. Petitioner continued to assert these constitutional grounds at the pretrial hearing on the prosecution's motion. R102.

The trial court granted the prosecution's motion and excluded the testimony of Petitioner's expert. R46.

Petitioner went to trial. The prosecution called an expert who opined that Petitioner's blood alcohol concentration at the time he was driving was over .08%. R106:177-78, 180. Petitioner could not call his expert to rebut that opinion.

A jury convicted Petitioner on both counts of the amended complaint. R70, R71. The trial court sentenced Petitioner to five days in jail, a fine, and a one year revocation of his driver's license. R77-78.

Petitioner appealed. The intermediate appellate court affirmed. App. 38. Petitioner then asked the Wisconsin Supreme Court to consider his constitutional right to present the expert's opinion. The Wisconsin Supreme Court granted review and affirmed Petitioner's convictions. App. 1.

However, the Wisconsin Supreme Court rejected the Court of Appeals' rationale and the prosecution's argument that PBT results were unreliable:

> Because we conclude that the State's countervailing compelling interest and not the reliability of the expert testimony is dispositive of the analysis, there is no reason for us to revisit Wisconsin's well-established role for the circuit court where expert testimony is proffered. The law in Wisconsin continues to be that questions of the weight and reliability of relevant evidence are matters for the trier of fact. As we stated in *State v. Walstad*, [119 Wis. 2d 483, 519, 351 N.W.2d 469 (1984)] "This is the relevancy test of our rules and we adhere to it." We, therefore, decline to adopt a *Daubert*-like approach to expert testimony that would make the judge the gatekeeper. (footnotes omitted). App. 1 ¶ 7.

Further, the Wisconsin Supreme Court assumed without deciding that the Sixth and Fourteenth Amendments afforded Petitioner a right to present the expert opinion resting in part on the PBT results. The court wrote:

> For reasons explained herein, we hold that in an OWI prosecution, even if a defendant establishes a constitutional right to present an expert opinion that is based in part on PBT results, the right to do so is outweighed by the State's compelling interest to exclude that evidence. App. 1 ¶ 5.

The court concluded that the State of Wisconsin had a compelling interest in excluding the PBT results as well as the expert opinion. That compelling state interest is "investigating and successfully prosecuting those who violate drunk driving laws." App. 1 ¶ 16. The court elaborated:

> It is beyond dispute that the State has a compelling interest in combating the threat to public safety created by drunk driving, as our cases and other courts have repeatedly recognized. On this basis, we therefore conclude that [Petitioner's] right to present evidence, assuming for the purposes of this argument that he has established that right by satisfying [the state court case implementing *United States v. Scheffer*], is nonetheless outweighed by the State's compelling interest in excluding the expert evidence based on PBT results. (footnote omitted). App. 1 ¶ 32.

Because it concluded that the compelling state interest outweighed Petitioner's constitutional right to present a defense, the court held that excluding Petitioner's expert opinion did not violate his constitutional right to present a defense. App. 1 ¶ 36.

Petitioner now seeks this Court's review on certiorari. Specifically, Petitioner requests that this Court summarily grant the petition for a writ of certiorari, vacate the judgment of the Wisconsin Supreme Court below, and remand with instructions to reconsider that judgment in light of *Holmes v. South Carolina*, 547 U.S. 319, 324-31 (2006); *Rock v. Arkansas*, 483 U.S. 44, 55-6 (1987); *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986); *Chambers v. Mississippi*, 410 U.S. 284 (*passim*) (1973), and other long standing decisions of this Court. Alternatively, petitioner requests that the Court grant the writ of certiorari and set the case for plenary briefing and consideration.

REASON FOR GRANTING THE WRIT

The Wisconsin Supreme Court's decision, which requires a trial court to exclude reliable evidence of innocence on the ground that the exclusion advances the investigation and prosecution of suspected drunk drivers, contravenes this Court's longstanding holdings on the defendant's constitutional right to present a defense.

1. The opinion below of the Wisconsin Supreme Court appears to be the only American case holding that a state, consistent with the rights to present a defense and to enjoy due process that the Sixth and Fourteenth Amendments guarantee, may exclude in a criminal trial reliable and direct evidence of the accused's innocence of an offense to enhance the

efficiency of arrests and prosecutions for that same offense.[2]

This Court never has sanctioned exclusion of evidence of innocence merely to ease investigation and prosecution of crimes.

2. The Wisconsin Supreme Court assumed that Petitioner had a constitutional right to present his expert's opinion testimony and cited opinions from this Court holding that the Sixth and Fourteenth amendments ensure the right of a defendant to offer a defense to a criminal charge. Specifically, that court proceeded on the assumption that the expert's opinion, even though it relied in part on the results of the PBT, was protected by these amendments. Nonetheless, the Wisconsin Supreme Court held that the state's compelling interest in combating drunk driving overrode the Petitioner's constitutional right to present that evidence of his innocence.

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[2] One court has held that, when a PBT shows no alcohol in a defendant's breath, it is a denial of due process to apply a statute which makes the result of a PBT inadmissible. *Patrick v. State*, 295 Ark. 473, 476-79, 750 S.W.2d 391 (1988), citing *Chambers v. Mississippi*, 410 U.S. 284 (1973), *Washington v. Texas*, 388 U.S. 14 (1967) and *Rock v. Arkansas*, 483 U.S. 44 (1987). A later opinion of the Arkansas Supreme Court explained that *Patrick* was limited to prosecutions in which the defendant denied consuming any alcohol. *Elser v. Arkansas*, 353 Ark. 143, 153, 114 S.W.2d 168 (2003). *See also Montana v. Reavely*, 338 Mont. 151, 164 P.3d 890, 898 (2007), dissent at ¶ 47.

However, here Wisconsin excluded expert opinion testimony that, if accepted by the jury, would have established that Petitioner's blood alcohol content at the time of driving was lower than the legal limit. The expert's opinion went directly to, and by itself could have established, Petitioner's innocence. Wisconsin forbade that expert opinion on the basis of a statutory exclusion of PBT results for some, but not all, evidentiary purposes. WIS. STAT. § 343.303. This exclusion operated to bar Petitioner's defense, even though (a) Wisconsin permits evidentiary use of PBT results for other purposes not expressly barred by statute (including guilt or innocence of non-driving charges), App. 1 ¶ 7 n.9; (b) the Wisconsin Supreme Court expressly refused to find Petitioner's proposed use of the PBT results unreliable, App. 1 ¶¶ 7, 16, 36; and (c) another Wisconsin statute permits expert opinions to rest on facts or data not admissible, if reasonably relied upon by experts in that field. *See* WIS. STAT. § 907.03.

While states have broad latitude under the United States Constitution to establish rules excluding evidence from criminal trials, *United States v. Scheffer*, 523 U.S. 303, 308 (1998), this latitude "has limits." *Holmes v. South Carolina*, 547 U.S. 319, 324-25 (2006). This Court long has held that "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Holmes*, 547 U.S. at 324, quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *see also Washington v. Texas*, 388

U.S. 14 (1967); *Chambers v. Mississippi*, 410 U.S. 284 (1973).

Rules excluding evidence offered by an accused are cabined by the purpose and impact of the exclusion. The purpose of excluding PBT results is to assist law enforcement in arresting and convicting drunk drivers.

Petitioner acknowledges that, in the abstract, the "interest in investigating and successfully prosecuting those who violate drunk driving laws" may be compelling, as the Wisconsin Supreme Court held. App. 1 ¶ 16. But the impact on Petitioner's trial was arbitrary and devastating.

Evidentiary rules that implement that compelling interest must not be "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Scheffer*, 523 U.S. at 308, quoting *Rock v. Arkansas*, 483 U.S. 44, 56 (1987). Evidentiary rules are impermissibly arbitrary if they exclude "important defense evidence but [do not] serve any legitimate interests." *Holmes*, 547 U.S. at 325.

Petitioner needed his expert to be able to use the PBT results in his calculations to establish that Petitioner was innocent of the drunk driving charges. An evidentiary rule that bars direct evidence of innocence by excluding use of PBT results neither promotes efficient investigation of drunk driving nor furthers public safety on the roads. An innocent driver here is a sober driver. Removing him from

roads does not rationally advance a compelling state interest.

The Wisconsin Supreme Court concluded that the exclusion of the PBT results makes it easier to arrest and prosecute persons charged with drunk driving and removes "needless obstacles" to that endeavor. App. 1 ¶ 4. However, those "needless obstacles" also make it easier to convict innocent drivers.

The state has no "legitimate interest" in convicting persons who can prove that they are innocent.

3. This Court never has invited a state to apply a rule excluding reliable evidence that would prove innocence when the only asserted state interest is enhancing the efficiency and certainty of convicting persons charged with that same crime. Increasing the certainty of conviction is an arbitrary reason to exclude evidence of innocence and not a compelling interest that can override the innocent driver's constitutional right to present a defense establishing his innocence.[3]

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[3] The Wisconsin Supreme Court's reasoning echoes an argument that this Court rejected just last year:

> Finally, respondent asks us to relax the requirements of the Confrontation Clause to accommodate the "'necessities of trial and the adversary process.'" . . . It is not clear whence we would derive the authority to do so. The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation

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"[W]e have found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused." *United States v. Scheffer*, 523 U.S. 303, 308 (1998). There is no more weighty interest of an accused than to be acquitted if actually innocent.

The Wisconsin Supreme Court's basic mistake was to equate a desire for efficient prosecution and conviction of one type of crime with a compelling state interest in excluding evidence of innocence of that same crime. Such rule is irreconcilable with the long line of cases from this Court on the right to present a defense.

Clause – like those other constitutional provisions – is binding, and we may not disregard it at our convenience.

Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527, 2540 (2009).

CONCLUSION

This Court should grant the writ of certiorari, summarily vacate the judgment below, and remand to the Wisconsin Supreme Court for further proceedings consistent with this Court's established precedent. Alternatively, petitioner requests that the Court grant the writ of certiorari and set the case for plenary briefing and consideration.

Respectfully submitted,

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SUPREME COURT OF WISCONSIN

CASE NO.: 2007AP1898-CR

COMPLETE TITLE:

State of Wisconsin,

Plaintiff-Respondent,

v.

Richard M. Fischer,

Defendant-Appellant-Petitioner.

REVIEW OF A DECISION
OF THE COURT OF APPEALS
2008 WI App 152
Reported at: 314 Wis. 2d 324, 761 N.W.2d 7
(Ct. App. 2008 – Published)

OPINION FILED:	February 2, 2010
SUBMITTED ON BRIEFS:	
ORAL ARGUMENT:	October 13, 2009

SOURCE OF APPEAL:

COURT:	Circuit
COUNTY:	Ozaukee
JUDGE:	Thomas R. Wolfgram

JUSTICES:

CONCURRED:	ZIEGLER, J., concurs (opinion filed). ROGGENSACK and GABLEMAN, JJ., join the concurrence.
DISSENTED:	
NOT PARTICIPATING:	

ATTORNEYS:

For the defendant-appellant-petitioner there were briefs filed by *Robin Shellow*, *Urszula Tempska*, and *The Shellow Group*, Milwaukee, and *James M. Shellow* and *Shellow & Shellow, S.C.*, Milwaukee, and oral argument by *James M. Shellow*.

For the plaintiff-respondent the cause was argued by *Thomas J. Balistreri*, assistant attorney general, with whom on the brief was *J.B. Van Hollen*, attorney general.

REVIEW of a decision of the Court of Appeals. *Affirmed*.

¶1 N. PATRICK CROOKS, J. This is a review of a court of appeals decision[1] that affirmed a ruling by the Ozaukee County Circuit Court, the Honorable Tom R. Wolfgram presiding, that excluded an expert's report and opinion testimony based in part on the results of a preliminary breath test (PBT) the defendant took just prior to arrest. Given the PBT result, the later blood test result, and typical absorption rates, the expert's opinion was that the defendant, Richard M. Fischer (Fischer), had a blood alcohol concentration (BAC) below the legal limit at the time he was pulled over by police and that his BAC level only later rose above the limit as his body continued to absorb the alcohol.

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[1] *State v. Fischer*, 2008 WI App 152, 314 Wis. 2d 324, 761 N.W.2d 7.

¶2 In its motion in limine, the State sought to exclude the evidence to the extent that it relied on Fischer's PBT results on two grounds: first, that Wis. Stat. § 343.303, which prohibits admitting PBT results as evidence in drunk driving cases except for limited purposes that are inapplicable here,[2] means that PBT results cannot be used as the basis for an admissible expert opinion in such a case; and second, that PBT results are not sufficiently reliable to serve as the basis for an expert opinion. Fischer argued that the motion in limine should be denied for two reasons: first, that Wis. Stat. § 907.03, which permits an expert to testify as to an opinion regardless of the admissibility of the underlying data on which the opinion is based, is an exception to Wis. Stat. § 343.303; and second, that any reading of those statutes that would require the exclusion of the expert's opinion would violate his constitutional right to present a defense. The circuit court and court of appeals ruled that the evidence must be excluded in general on the grounds advanced by the State: that Wis. Stat. § 343.303 prohibited the PBT results' use and that PBT results were insufficiently reliable to

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[2] Wis. Stat. § 343.303 states in relevant part: "The result of the preliminary breath screening test shall not be admissible in any action or proceeding except to show probable cause for an arrest, if the arrest is challenged, or to prove that a chemical test was properly required or requested of a person under s. 343.305(3)."

All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

form the basis of an expert opinion that is admissible under Wis. Stat. §§ 907.02 and 907.03. Before this court, Fischer expanded his argument to urge the court to abandon the established Wisconsin "limited gatekeeper" approach, where reliability of evidence is a matter for the finder of fact, and instead adopt the federal standard articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[3] where the trial judge has a significant role in determining reliability.

¶3 The questions before us are thus (1) whether Wis. Stat. § 343.303 creates an absolute bar on the admission of PBT results in operating while intoxicated (OWI) prosecutions, even when used as the basis for an expert's opinion offered under Wis. Stat. § 907.03; (2) if so, whether such an application of the statute violates a defendant's constitutional right to present a defense; and (3) whether we will accept counsel's invitation to revisit and reject the Wisconsin case law that establishes that "the reliability of the evidence is a weight and credibility issue for the fact finder."[4]

¶4 Though our analysis diverges in some respects from that of the circuit court and the court of appeals, we agree that the circuit court properly

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[3] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 588 (1993) (holding that "under the [Federal Rules of Evidence] the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable")

[4] *State v. Peters*, 192 Wis. 2d 674, 690, 534 N.W.2d 867 (Ct. App. 1995).

granted the State's motion in limine seeking to exclude the report and expert opinion testimony Fischer sought to introduce. Wisconsin Stat. § 343.303 expressly bars PBT results in OWI cases, and to allow Wis. Stat. § 907.03 to trump that prohibition would simply nullify that provision and would consequently present a variety of needless obstacles to the investigation, prosecution, and defense of drunk driving cases. Giving effect to the two statutes together under these circumstances admittedly presents difficulties, but it is no solution to transform Wis. Stat. § 343.303's inadmissibility into admissibility, reversing the legislature's clearly stated intention. Principles of statutory construction and our duty to respect clear legislative policy decisions require us to read Wis. Stat. § 343.303 to create an exception to § 907.03 and forbid us to read § 907.03 as nullifying the prohibition in § 343.303.[5]

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[5] In this instance, we are not dealing with a legislative rule that "unduly burden[s] or substantially interfere[s] with" the exercise of the court's power, so we do not analyze the questions presented in terms of the shared power doctrine. *See Barland v. Eau Claire County*, 216 Wis. 2d 560, 573, 575 N.W.2d 691 (1998) ("In these areas of 'shared power,' one branch of government may exercise power conferred on another only to an extent that does not unduly burden or substantially interfere with the other branch's exercise of its power.") (quoting *In re Complaint Against Grady*, 118 Wis. 2d 762, 775, 348 N.W.2d 559 (1984)). There are cases in which we do not defer to legislative choices that affect the judicial branch; for a case voiding a statute that impermissibly "abrogated or modified by legislative action" the right of a court to direct a verdict, see *Thoe v. Chicago, Milwaukee & St. Paul Ry. Co.*, 181 Wis. 456, 464, 195 N.W. 407 (1923) (quoting

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¶5 Fischer argues that excluding the expert's opinion violates his right under the constitutions of the United States and Wisconsin to present a defense. We disagree. In *United States v. Scheffer,* the United States Supreme Court held that state rules that result in exclusion of defense evidence are constitutionally valid "so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'"[6] This court articulated and applied the *Scheffer* analysis in *State v. St. George,* 2002 WI 50, ¶52, 252 Wis. 2d 499, 643 N.W.2d 777. To evaluate Fischer's constitutional claim, we apply the two-part test set forth in *St. George,* 252 Wis. 2d 499, ¶¶54-55. We need not decide whether Fischer has satisfied the factors in the first step, i.e., that the testimony of the expert witness met the standards of Wis. Stat. § 907.02, that the opinion testimony in question is "clearly relevant to a material issue[,]" *id.*, ¶54, that it is necessary to Fischer's defense, and that its probative value outweighs the prejudicial effect. We assume for purposes of this analysis that Fischer has satisfied all four factors in the first part of the inquiry. We then reach the second step, which involves weighing the defendant's right against the State's interest in excluding the evidence. For reasons explained herein, we hold that in an OWI prosecution,

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Kiley v. Chicago, Milwaukee & St. Paul Ry. Co., 138 Wis. 215, 226, 119 N.W. 309 (1909)).

[6] *United States v. Scheffer,* 523 U.S. 303, 308 (1998) (quoting *Rock v. Arkansas,* 483 U.S. 44, 56 (1987)).

even if a defendant establishes a constitutional right to present an expert opinion that is based in part on PBT results, the right to do so is outweighed by the State's compelling interest to exclude that evidence. Permitting the use of that evidence as the basis for an expert opinion would render meaningless the legislature's act forbidding such evidence in OWI prosecutions, an act that promotes efficient investigations of suspected drunk driving incidents and furthers the State's compelling interest in public safety on its roads. The legislature's decision limiting the admissibility of PBT results helps law enforcement officers do their jobs with more cooperation from drivers than they would otherwise be likely to get – cooperation that is especially critical given that a PBT may be requested when an officer has a basis to justify an investigative stop but has not established probable cause to justify an arrest.[7]

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[7] In *County of Jefferson v. Renz*, 231 Wis. 2d 293, 310, 603 N.W.2d 541 (1999), we addressed "the PBT's place in the process of an OWI investigation" in this way:

> First, an officer may make an investigative stop if the officer "reasonably suspects" that a person has committed or is about to commit a crime, Wis. Stat. [§] 968.24, or reasonably suspects that a person is violating the non-criminal traffic laws, *State v. Griffin*, 183 Wis. 2d 327, 333-34, 515 N.W.2d 535 (Ct. App. 1994). After stopping the car and contacting the driver, the officer's observations of the driver may cause the officer to suspect the driver of operating the vehicle while intoxicated. If his observations of the driver are not sufficient to establish probable cause for arrest for

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¶6 Accordingly, we affirm. Though we benefit from the analyses of the court of appeals and the circuit court, we reach the result via a different analysis than that of those courts. The circuit court's grant of the motion in limine excluding the report and expert opinion was proper under Wisconsin statutes and it did not violate Fischer's constitutional right to present a defense. The rule we adopt here is not a blanket rule against absorption curve opinion evidence but rather a rule prohibiting use of PBT results in the manner attempted here.[8]

¶7 Our analysis does not turn on an evaluation of the reliability of an expert opinion based on PBT results, which after all are routinely relied on to establish probable cause for arrest and have been held to be admissible for purposes other than those prohibited by statute.[9] Because we conclude that the

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> an OWI violation, the officer may request the driver to perform various field sobriety tests. The driver's performance on these tests may not produce enough evidence to establish probable cause for arrest. The legislature has authorized the use of the PBT to assist an officer in such circumstances.

(Footnote omitted.)

[8] We recognize the concerns expressed by the United States Supreme Court about blanket exclusions in *Rock v. Arkansas*, 483 U.S. 44, 56 (1987), and *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (discussing per se exclusions of evidence by state evidence rules).

[9] *See, e.g., State v. Doerr*, 229 Wis. 2d 616, 622, 599 N.W.2d 897 (Ct. App. 1999) (holding PBT result admissible where defendant was charged with battery to police officer and resisting

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State's countervailing compelling interest and not the reliability of the expert testimony is dispositive of the analysis, there is no reason for us to revisit Wisconsin's well-established role for the circuit court where expert testimony is proffered. The law in Wisconsin continues to be that questions of the weight and reliability of relevant evidence are matters for the trier of fact. As we stated in *State v. Walstad,* "This is the relevancy test of our rules and we adhere to it."[10] We, therefore, decline to adopt a *Daubert*-like approach to expert testimony that would make the judge the gatekeeper.

I. BACKGROUND

¶8 The following facts are undisputed: In January 2005, Fischer was pulled over when an officer observed lane deviation and suspected drunk driving. The stop occurred at approximately 1:40 a.m. Fischer

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officer); *State v. Beaver,* 181 Wis. 2d 959, 970 & n.5, 512 N.W.2d 254 (Ct. App. 1994) (ruling that Wis. Stat. § 343.303 did not bar admissibility of PBT result in trial for sexual assault, holding that the statutory bar on the evidentiary use of PBT results is limited to violations of Wis. Stat. §§ 346.63, 940.09, and 940.25, and affirming exclusion of the result on other grounds).

[10] *State v. Walstad,* 119 Wis. 2d 483, 519, 351 N.W.2d 469 (1984) ("In a state such as Wisconsin, where substantially unlimited cross-examination is permitted, the underlying theory or principle on which admissibility is based can be attacked by cross-examination or by other types of impeachment. Whether a scientific witness whose testimony is relevant is believed is a question of credibility for the finder of fact, but it clearly is admissible.").

performed poorly on field sobriety tests. After those tests, at a time unspecified in the police report, a PBT was administered, and it measured a breath alcohol content of .11 percent.[11] Fischer was arrested; a chemical blood test taken at 2:48 a.m. showed a BAC of .147 percent. He was charged with operating while intoxicated, second offense, and operating with a BAC of .08 or more, second offense, contrary to Wis. Stat. § 346.63(1)(a) and (b). Fischer pled not guilty, and the case was set for trial.

¶9 He retained an expert who prepared a report using the data from the two tests, estimates as to the precise timing of the breath test after the stop, and absorption rate formulas to generate absorption curves, with the purpose of estimating the BAC prior to the time the PBT was taken, at the moment Fischer was stopped. In his report, the expert said his calculations were based on a method similar to the one known as speculative retrograde extrapolation, which uses known data to estimate a person's BAC at an earlier point in time. In the first report, dated February 13, 2006, the expert included the results of both tests and reached the following conclusion:

> I conclude that Mr. Fischer was in the absorptive phase when he was stopped and that his BAC was increasing with a high

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[11] "'Alcohol concentration' means the number of grams of alcohol in 100 milliliters of a person's blood or the number of grams of alcohol in 210 liters of a person's breath." Wis. Stat. § 885.235(1)(a).

> degree of scientific certainty. In addition my analyses, based on the chosen assumptions, indicate that the data are most consistent with, but do not establish, the hypothesis that Fischer was below the 0.08% threshold when stopped.

¶10 In June 2006, the State filed a motion in limine to exclude the expert's report and testimony "to the extent the report and testimony rely on the PBT result," on the grounds that "(1) the PBT result is inadmissible at trial pursuant to statute and (2) there is no showing that the PBT result is reliable for any purpose other than probable cause." After the State filed its motion in limine, Fischer submitted a second report, dated July 7, 2006, which his expert prepared on the basis that the PBT result could not be included in the data used for the analysis. The expert concluded, "[T]he single determination of blood alcohol made at 2:48 [a.m.] over an hour after [Fischer's] arrest is insufficient to establish that his blood alcohol content was above the 0.08% threshold when he was stopped at 1:40 [a.m.]."

¶11 In a third submission by the expert, which was attached to Fischer's response to the State's motion in limine and submitted as Fischer's offer of proof[12] after the court granted the motion, the expert,

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[12] Wisconsin Stat. § 901.03(1)(b) provides that "[e]rror may not be predicated upon a ruling which . . . excludes evidence unless . . . the substance of the evidence was made known to the judge by offer or was apparent from the context within which

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Dr. John Steele, contrasted the analysis possible using both the PBT and blood test results with the analysis possible without the use of the PBT result, and concluded:

> If one rejects the breath test data and relies only on the blood test, then the plausible range of BAC when Mr. Fischer was stopped ranges from near 0.0% to 0.164%[,] a range which is both higher and lower than the critical 0.080% legal threshold. . . .
>
> If one includes the breath test result, . . . then at the time he was stopped Mr. Fischer most likely had a BAC of approximately 0.040% to 0.067%.

¶12 The report that was the subject of the motion in limine included Fischer's PBT result in the text of the report. Though the report attached to Fischer's offer of proof stated that the PBT result "played *no* role in computing the curves," the report acknowledged that the PBT result played a significant role in the overall analysis by "allow[ing] the range of BAC [at the time of the stop] to be narrowed down."

¶13 Following a motion hearing on the matter, the circuit court granted the State's motion in limine.

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questions were asked." *See State v. Dodson*, 219 Wis. 2d 65, 73, 580 N.W.2d 181 (1998) ("Two purposes are served by an offer of proof: first, provide the circuit court a more adequate basis for an evidentiary ruling and second, establish a meaningful record for appellate review.").

In so doing, the court observed that it was not aware of the legislative history of § 343.303, but that the legislature's intention was clear that "it was never contemplated that [a PBT] would be an evidentiary test." The circuit court said its ruling was made "in light of the legislature's clear pronouncement about the admissibility here." We note that had Fischer disclosed to Dr. Steele when and what alcoholic beverages he had been drinking, absorption curve opinion evidence from the expert based on that evidence would have been admissible.[13]

¶14 The matter was tried to a jury. The defense theory, as summarized in counsel's closing argument, was that the arresting officer was overeager to make an arrest and was therefore "not fair," and that Fischer was "going up on the absorption curve" when he was stopped and his BAC had not reached the .08 percent threshold. The jury convicted Fischer on both charges. Fischer appealed the circuit court's ruling excluding the expert's evidence and the court of appeals

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[13] See, for example, *State v. Vick,* 104 Wis. 2d 678, 684-85, 312 N.W.2d 489 (1981) (basing an absorption curve defense on breathalyzer test result and testimony from defendant as to the amount of alcohol he had consumed), and Wis JI – Criminal 234 (2003), which states in part,

> Evidence has . . . been received as to how the body absorbs and eliminates alcohol. You may consider the evidence regarding the analysis of the (breath) (blood) (urine) sample and the evidence of how the body absorbs and eliminates alcohol along with all the other evidence in the case. . . .

affirmed the circuit court's ruling. The court of appeals noted that, in order to apply Wis. Stat. § 907.03 as Fischer contends it must be and permit an expert to base an opinion on and set before the jury inadmissible PBT results, the court "would have to conclude that any rule excluding evidence takes a back seat to a defendant's desire to admit such evidence, just because the State could rebut the evidence if it wished. That cannot be the law." *State v. Fischer*, 2008 WI App 152, ¶20, 314 Wis. 2d 324, 761 N.W.2d 7. In evaluating Fischer's constitutional claim, the court of appeals applied the *St. George* test and determined that Fischer had failed to satisfy the requirements of both parts of the test. Applying the first part of the *St. George* test, the court of appeals said Fischer failed to show that the proffered evidence satisfied the standards of Wis. Stat. § 907.02 (specifically, the court of appeals held that it would not assist the trier of fact) and that it had probative value. *Id.*, ¶24. Applying the second part of the *St. George* test, the court of appeals found Fischer had failed to show that his interest in presenting the evidence outweighed the State's compelling interest in excluding the evidence. *Id.*, ¶17. The rationale for the court of appeals' analysis in both steps centered on its view that PBT results were insufficiently reliable to serve as the basis for an expert opinion.

II. STANDARD OF REVIEW

¶15 This case involves the interpretation of Wis. Stat. §§ 343.303, 907.02, and 907.03. Statutory

interpretation presents a question of law that this court reviews de novo. *Rechsteiner v. Hazelden,* 2008 WI 97, ¶26, 313 Wis. 2d 542, 753 N.W.2d 496. It also involves review of a court's ruling on the admissibility of expert opinion.

> The admissibility of expert opinion testimony lies in the discretion of the circuit court. A circuit court erroneously exercises its discretion if it makes an error of law or neglects to base its decision upon facts in the record. . . . The question then is whether the circuit court applied the correct legal principles to the facts of record. This court decides any questions of law which may arise during its review of an exercise of discretion independently of the circuit court and court of appeals.

St. George, 252 Wis. 2d 499, ¶37 (footnotes omitted).

III. ANALYSIS

¶16 We agree with the court of appeals that the statutes at issue here are best read to exclude expert testimony based on PBT results. We also agree that the State's compelling interest in excluding PBT results outweighs Fischer's right to present this evidence. As we explain herein, however, our analysis does not turn on the premise that PBT results are insufficiently reliable to serve as the basis of admissible expert testimony. It turns instead on the second part of the *St. George* test and on the State's

compelling interest in investigating and successfully prosecuting those who violate drunk driving laws.

¶17 A preliminary matter to clarify is whether there is any meaningful difference between Fischer's presenting the expert's report that included the actual PBT result and presenting the expert's opinion testimony based on analysis of data including the PBT result, presumably without explicitly disclosing, at least initially, the PBT result to the jury. The motion in limine asked the circuit court to exclude both the written report and the opinion testimony. In his briefing to this court, Fischer focused on the admission of the expert opinion testimony and asserted that he "never intended to submit Dr. Steele's report to the jury," and that "[t]he admission of Dr. Steele's *opinions* would not have presented PBT results for the jury's consideration." In other words, we understand Fischer to be arguing, if the expert testified only to his opinion, there would arguably be no technical violation of Wis. Stat. § 343.303.

¶18 In practical terms, however, in this case there is no meaningful difference. The PBT results, whether initially fully disclosed to the jury or not, would inevitably be disclosed to the jury the moment that the expert testified as to the methodology and data that underlie the opinion.[14] Fischer's brief

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[14] Permitting references to a prior PBT without giving the actual measurement is also unworkable. A defendant might well even benefit additionally from such coy use of the results. If jurors infer (or are told) that a test was administered but receive no results, they might infer a *lower* PBT than actually existed

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explains that "[t]he jury would have heard in general Dr. Steele's methodology and the conclusions he reached." The methodology, of course, involved using the PBT result and the blood test result to indicate whether any absorption curves were consistent with both data points. Given that the expert represented in the report dated July 7, 2009, "[W]e can know virtually nothing about the BAC when [Fischer] was stopped" if the blood test is the only available evidence, it stands to reason that even a limited explanation of the methodology Fischer wanted to have put before the jury would have to include the first data point: the PBT result. Under these circumstances, admitting an expert opinion that relies on PBT results means admitting the PBT results in one form or another, and that cannot be done without violating Wis. Stat. § 343.303. We also again note that the offer of proof included Fischer's PBT result and acknowledged the role it played in the expert's analysis.

¶19 Fischer argues that even if Wis. Stat. § 343.303 bars the use of PBT results, Wis. Stat. §§ 907.02 and 907.03, read together, create an exception to the prohibition in Wis. Stat. § 343.303 and explicitly permit use as the basis of an expert's opinion.[15] Those statutes permit an expert to testify to an

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on the assumption that the State would not fail to disclose any result favorable to the prosecution.

[15] Wisconsin Stat. §§ 907.02 and 907.03 provide:

907.02 Testimony by experts. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact

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opinion based on facts that are otherwise inadmissible if they are "of a type reasonably relied upon by experts." Wis. Stat. § 907.03.

¶20 The thorny question of what to do with inadmissible evidence that experts rely upon as a basis for an opinion is one that has proved difficult to answer with a fair and workable rule.

¶21 Law professor Daniel Blinka concisely summarizes the practical difficulty of explaining the bases for expert opinions when they include inadmissible evidence, and the unsatisfactory options for resolving the question:

> Problems arise, however, when experts are called upon to explain how they reached a conclusion. What should be done with the experts' inadmissible bases? Does the experts' reliance validate the otherwise inadmissible information, thereby transforming it into admissible evidence? Conversely, should the court bar any mention of the tainted

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in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

907.03 Bases of opinion testimony by experts. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

> bases while permitting only the expert's testimony about the opinion? Or should the judge instruct the jury to consider the inadmissible bases for whatever bearing they have on the cogency of the expert's opinion testimony, but not for any other purpose? If the judge elects the latter course, what exactly does such an instruction mean? And if such limiting instructions are meaningless, is Rule 703 [a federal evidence rule parallel to Wis. Stat. § 907.03] a device that allows a party to simply parade inadmissible evidence before the jury in direct contravention of the exclusionary rules?[16]

¶22 Recent changes in federal evidence rules attempted to resolve the matter in federal courts by allowing disclosure of otherwise inadmissible facts or data to the jury after a judge has balanced the evidence's probative value against any prejudicial effect. Fed. R. Evid. 703 advisory committee's note, 2000 amendment. Blinka observes that this approach "is problematic on both policy and practice grounds" and illustrates what he calls the sometimes "nonsensical" results:

> In theory, the "otherwise" inadmissible basis is put before the jury for the limited purpose of explaining the expert's opinion and reasoning. But this creates some horrendous

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[16] Daniel D. Blinka, *"Practical Inconvenience" or Conceptual Confusion: The Common-Law Genesis of Federal Rule of Evidence 703*, 20 Am. J. Trial Advoc. 467, 469 (1997).

> difficulties. In the hearsay context, although the expert may have relied upon the hearsay statement for the truth of the matter asserted, the jury is instructed that it cannot use the statement for the very same purpose.[17]

¶23 We therefore approach this case with an understanding of the larger context and an awareness that courts have tried various approaches to expert opinion evidence, in an effort to create fair and workable solutions that appropriately filter the evidence presented to juries.

¶24 Our analysis is premised on long-established principles of statutory construction. "It is, of course, a solemn obligation of the judiciary to faithfully give effect to the laws enacted by the legislature, and to do so requires a determination of statutory meaning. . . . Therefore, the purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect."[18] When statutes conflict, we must attempt to reconcile them if possible.[19] When confronted with an apparent conflict between statutes, we construe sections on the same subject matter to harmonize the provisions and to

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[17] 7 Daniel D. Blinka, *Wisconsin Practice: Wisconsin Evidence* § 702.604, at 621-22 (3d ed. 2008).

[18] *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110.

[19] *Bingenheimer v. Wis. Dep't of Health & Soc. Servs.*, 129 Wis. 2d 100, 107-08, 383 N.W.2d 898 (1986).

give each full force and effect.[20] We will not construe statutes so as to work unreasonable results.[21]

¶25 Fortunately, in this case, the legislature's policy decision regarding the absolute inadmissibility of the PBT results under these circumstances simply could not be clearer. Reading the statutes together to create an exception to Wis. Stat. § 907.03 by excluding expert evidence to the extent that it is based on prohibited PBT results comports with our obligation to give effect to the legislature's intent. The alternative would likely nullify Wis. Stat. § 343.303 whenever a party attached the opinion or report of an expert to the PBT result it wished to get before the jury.

¶26 We approach this question carefully, cognizant of the effect this decision has on the law enforcement officers, prosecutors, and defense counsel who investigate and try these cases daily. The practical implications of a contrary reading would be significant. Among them would be the fact that, assuming that the rule would apply equally to the State, PBT results could routinely be used against defendants in spite of a statute to the contrary.[22] Further, reversing

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[20] *Glinski v. Sheldon*, 88 Wis. 2d 509, 519, 276 N.W.2d 815 (1979).

[21] *Cross v. Hebl*, 46 Wis. 2d 356, 361, 174 N.W.2d 737 (1970).

[22] If the presentation of otherwise inadmissible PBT result evidence via an expert were permitted, there would be no reason to limit its use to the defense. Unlike other evidence that is unavailable to the prosecution (the involuntary testimony of the defendant, for example), PBT results are evidence

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the legislature's assurance to drivers that PBT results will not be used in a prosecution for OWI could well mean that fewer suspected drunk drivers would be willing to submit to a PBT in the first place, with the result that police could find themselves more frequently in situations where they had reasonable suspicion sufficient to justify an investigative stop, but perhaps insufficient evidence to establish probable cause for an arrest. Under circumstances like this, an officer could be faced with the constitutional necessity of releasing a driver he or she reasonably believed to be intoxicated.

¶27 Fischer contends that if the statutes are construed to exclude evidence based on the PBT results, as we do herein, they violate his constitutional right to present a defense.[23] Where a defendant

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that is originally in the State's possession that must be turned over to the defense. Rules of fair play certainly do not go so far as to require the State to gather and turn over evidence that is usable only by the defense.

[23] *See Crane*, 476 U.S. at 690 ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.") (citations and internal quotation marks omitted); *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984) ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment [.]"). In *State v. Pulizzano*, 155 Wis. 2d 633, 645, 456 N.W.2d 325 (1990), this court identified the confrontation and compulsory process

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challenges the exclusion of expert testimony evidence on the grounds that it violates his or her right to present a defense, the court evaluates the claim using the test set forth in *St. George* pursuant to the United States Supreme Court's decision in *Scheffer*:

> For the defendant to establish a constitutional right to the admissibility of the proffered expert witness testimony in the present case, the defendant must satisfy a two-part inquiry. . . . This two-part inquiry enables a circuit court to determine the accused's interest in admitting the evidence and to determine whether the evidence is clearly central to the defense and the exclusion of the evidence is arbitrary and disproportionate to the purpose of the rule of exclusion, so that exclusion "undermine[s] fundamental elements of the defendant's defense."

St. George, 252 Wis. 2d 499, ¶53 (quoting *Scheffer*, 523 U.S. at 315).

¶28 The court then listed the factors for each step of the inquiry:

> In the first part of the inquiry, the defendant must satisfy each of the following four factors through an offer of proof. The defendant must show:

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clauses of Article I, Section 7 of the Wisconsin Constitution as a parallel source of such a right.

> 1) The testimony of the expert witness met the standards of Wis. Stat. § 907.02 governing the admission of expert testimony.
>
> 2) The expert witness's testimony was clearly relevant to a material issue in this case.
>
> 3) The expert witness's testimony was necessary to the defendant's case.
>
> 4) The probative value of the testimony of the defendant's expert witness outweighed its prejudicial effect.
>
> After the defendant successfully satisfies these four factors to establish a constitutional right to present the expert testimony, a court undertakes the second part of the inquiry by determining whether the defendant's right to present the proffered evidence is nonetheless outweighed by the State's compelling interest to exclude the evidence.

St. George, 252 Wis. 2d 499, ¶¶54-55 (footnotes omitted).

¶29 We assume without deciding that the defendant in the present case has satisfied the four factors of the first part of the inquiry, since we view the second part of the inquiry as determinative of the outcome in this case.[24] Assuming Fischer has

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[24] For examples of cases where this court has assumed without deciding that a preliminary step in the analysis has been satisfied, see *Washburn County v. Smith,* 2008 WI 23, ¶86,

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established a right to present the expert evidence in question, we nevertheless conclude for reasons given herein that his right to do so is outweighed by the State's compelling interest in excluding the evidence. Accordingly, exclusion of the evidence did not result in a violation of his constitutional right to present a defense.

¶30 In its brief to this court, the State argues that unique constitutional challenges are presented in OWI investigations and that significant law enforcement purposes are served by prohibiting the use of PBT results in OWI prosecutions:

> The critical fact is that the preliminary breath test is a preliminary screening tool used during the investigation of a person suspected of drunk driving before there is probable cause to make an arrest. A preliminary breath test may be requested when the police have more evidence than reasonable suspicion necessary to justify an investigative stop, but less than probable cause necessary to justify an arrest.

¶31 The legislative history of Wis. Stat. § 343.303 begins with Wisconsin Act 193, § 7, ch. 193, Laws of

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308 Wis. 2d 65, 746 N.W.2d 243 ("Even assuming that the defendant has satisfied the first two prongs of the *Quelle* inquiry, he has not satisfied the third prong."), and *Nichols v. Progressive N. Ins. Co.*, 2008 WI 20, ¶19, 308 Wis. 2d 17, 746 N.W.2d 220 (for purposes of public policy analysis, assuming without deciding that plaintiffs established all four elements of a common-law negligence claim).

1977, the original legislation creating what later became Wis. Stat. § 343.303, and it contains evidence that is consistent with this rationale. An analysis prepared by the Legislative Reference Bureau of the proposed bill (A.B. 1) states the following:

> Law enforcement officers are authorized to request persons suspected of driving under the influence of an intoxicant to submit to a preliminary breath test. The test results would not be admissible in any court action or proceeding where it is material to prove that the person was driving under the influence of an intoxicant, *but would give the officer a basis to decide if further chemical analysis would be necessary.*[25]

While that is a statement of fact, not a statement that that was the reason it was adopted, it is worth noting that we located no statement about the reliability or unreliability of the PBT in the legislative history.

¶32 In the evidentiary gap between reasonable suspicion and probable cause for arrest, a voluntarily taken PBT can furnish the necessary evidence to remove an impaired driver from the road.[26] Recognizing

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[25] Drafting File for 1977 Wis. Act 193, *Analysis by the Legislative Reference Bureau* of 1977 A.B. 1, Legislative Reference Bureau, Madison, Wis. (emphasis added).

[26] This approach reflects the analysis we undertook of Wis. Stat. § 343.303 in *Renz* to determine the quantum of proof necessary for an officer to request that a driver take a PBT: "[W]e conclude that the context, history and purpose of the statute all suggest that 'probable cause to believe' refers to a

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this, the State suggests, the legislature reasonably may have sought to eliminate any disincentive a driver might have to consent to take the PBT by assuring drivers that the results would not be used at trial. The State argues that promoting the gathering of evidence necessary to arrest those who are actually intoxicated obviously furthers the State's compelling interest in arresting and prosecuting drunk drivers, and we agree. It is beyond dispute that the State has a compelling interest in combating the threat to public safety created by drunk driving, as our cases and other courts have repeatedly recognized.[27] On this basis, we therefore conclude that Fischer's right to present evidence, assuming for the purposes of this argument that he has established that right by satisfying the factors of the first part of the *St. George* test, is nonetheless outweighed by the State's compelling interest in excluding the expert evidence based on PBT results.

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quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop, . . . but less than the level of proof required to establish probable cause for arrest." 231 Wis. 2d at 316.

[27] "No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roads are legion." *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990). "Obviously, enforcing drunk driving laws is a significant state interest. No supporting authority is necessary to identify the significant toll that drunken drivers have exacted on the American public in loss of life, limb, and property." *State v. Bohling*, 173 Wis. 2d 529, 545, 494 N.W.2d 399 (1993).

¶33 Finally, we turn to Fischer's invitation to revisit the law regarding the admissibility of expert testimony and to adopt a *Daubert*-like approach with the judge as the gatekeeper. As we noted initially, our analysis does not turn on an evaluation of the reliability of an expert opinion based on PBT results. This therefore is not an appropriate case on which to base such an abrupt departure from established case law, especially on the strength of undeveloped arguments. As stated earlier, our analysis diverges from that of the circuit court and the court of appeals.

¶34 We have taken a different approach than the one taken by both the circuit court and the court of appeals in their decisions to exclude the evidence. The question of whether PBT results are adequately reliable figured in the analysis of each of those courts in several respects, and the question of reliability was also raised by the State as a reason to exclude expert evidence based on PBT results.[28] The accuracy of this type of test may be subject to dispute, but Wisconsin courts have nevertheless upheld its admission for purposes other than those prohibited by Wis. Stat. § 343.303.[29] There is no basis for speculating that the

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[28] For example, the State in its brief to this court argues, "Fischer's expert wanted to use breath test results [that] would have been of dubious reliability even under the best testing conditions that were obtained from a breath testing device that may have been unable to produce results [that] were reliable at all."

[29] *See, e.g., supra* note 9 (citing *Doerr*, 229 Wis. 2d at 622, and *Beaver*, 181 Wis. 2d at 970).

reason the legislature prohibited the evidentiary use of a test that is used hundreds of times every day in Wisconsin is that it is "of dubious reliability even under the best testing conditions," as the State argued in its brief. In fact, a review of the legislative history of Wis. Stat. § 343.303[30] gives no indication whatsoever that the prohibition on the use of PBT results is rooted in concerns about reliability of the test. If the PBT's reliability were of such concern, it would be a small thing for any competent defense attorney to attack the reliability of PBT results and thereby limit the value to the prosecution of such evidence. Saying that PBT results are not admissible is not the same thing as saying they are not reliable.

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[30] In *Renz*, 231 Wis. 2d at 312, we set forth the statute's legislative history:

> The Wisconsin legislature first authorized a preliminary breath test in 1977 as part of Assembly Bill 1 of the November 1977 Special Session. 1977 A.B. 1; § 7, ch. 193, Laws of 1977. That original PBT statute provided "[i]f a law enforcement officer has probable cause to believe that a person has violated s. 346.63(1) . . . , the officer may request the person, prior to arrest and issuance of a citation, to take a preliminary breath test. . . ." Wis. Stat. § 343.305(2)(a) (1977-78) (repealed 1981).
>
> . . . .
>
> In 1981, as part of the budget bill, the legislature enacted amendments to the OWI laws that, among other changes, removed the PBT from Wis. Stat. § 343.305 and created Wis. Stat. § 343.303. §§ 1568b and d, ch. 20, Laws of 1981.

(Brackets and first two ellipses in original.)

Wisconsin's tradition of leaving the weight and credibility of the evidence to the trier of fact, which continues to be the law, cannot be squared with an analysis that excludes evidence on the basis of its lack of reliability.

IV. CONCLUSION

¶35 Accordingly, we affirm. Though we benefit from the analyses of the court of appeals and the circuit court, we reach the result via a different analysis than that of those courts. The circuit court's grant of the motion in limine excluding the report and expert opinion was proper under Wisconsin statutes and it did not violate Fischer's constitutional right to present a defense. The rule we adopt here is not a blanket rule against absorption curve opinion evidence but rather a rule prohibiting use of PBT results in the manner attempted here.

¶36 Our analysis does not turn on an evaluation of the reliability of an expert opinion based on PBT results, which after all are routinely relied on to establish probable cause for arrest and have been held to be admissible for purposes other than those prohibited by statute. Because we conclude that the State's countervailing compelling interest and not the reliability of the expert testimony is dispositive of the analysis, there is no reason for us to revisit Wisconsin's well-established role for the circuit court where expert testimony is proffered. The law in Wisconsin continues to be that questions of the weight and

reliability of relevant evidence are matters for the trier of fact. As we stated in *State v. Walstad,* "This is the relevancy test of our rules and we adhere to it." 119 Wis. 2d at 519. We, therefore, decline to adopt a *Daubert*-like approach to expert testimony and make the judge the gatekeeper.

By the Court. – The decision of the court of appeals is affirmed.

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¶37 ANNETTE KINGSLAND ZIEGLER, J. *(concurring).* I join the majority opinion's conclusion that Wis. Stat. § 343.303 "expressly bars" preliminary breath test (PBT) results in trials in which the charge is operating under the influence of an intoxicant in violation of Wis. Stat. § 346.63(1)(a) (OWI) or operating with a prohibited alcohol concentration in violation of § 346.63(1)(b) (PAC). *See* majority op., ¶4. As the majority opinion aptly states, "[T]he legislature's policy decision regarding the absolute inadmissibility of the PBT results under these circumstances simply could not be clearer." Majority op., ¶25. However, I write separately and concur because unlike the majority opinion, which concludes that the reliability of the PBT results is not dispositive, *see* majority op., ¶7, I conclude that as a matter of law PBT results are neither reliable nor admissible for the purpose of confirming or dispelling a defendant's specific alcohol concentration in an OWI or PAC trial. In such a trial, an expert cannot reasonably rely on PBT results for that purpose, and thus, PBT results are not

admissible to prove or disprove a specific level of alcohol concentration. *See* Wis. Stat. § 343.303 ("The result of the preliminary breath screening test shall not be admissible in any action or proceeding except to show probable cause for an arrest, if the arrest is challenged, or to prove that a chemical test was properly required or requested of a person under s. 343.305(3)."). Finding an expert who wishes to rely on the PBT results to form an opinion does not transform the inadmissible and unreliable evidence into admissible evidence in an OWI or PAC trial, and such testimony would only confuse rather than assist the jury and would completely undermine the presumption afforded to proper chemical testing.

¶38 While there are other scenarios in which PBT results may be admissible, the circumstances of those cases do not involve PBT results being utilized to prove specific alcohol concentration as an element of the crime. *See State v. Doerr*, 229 Wis. 2d 616, 622-25, 599 N.W.2d 897 (Ct. App. 1999) (agreeing with the circuit court that PBT results were admissible at trial to assist the jury in evaluating the defendant's charges of battery to a law enforcement officer in violation of Wis. Stat. § 940.20(2) and resisting an officer in violation of Wis. Stat. § 946.41); *State v. Beaver*, 181 Wis. 2d 959, 969-71, 512 N.W.2d 254 (Ct. App. 1994) (concluding that PBT results may be admissible at trial as evidence of the defendant's comprehension of his *Miranda* rights or his ability to intelligently waive them). In contrast, in OWI and PAC cases, proving a specific alcohol concentration is often a

hotly contested issue; a specific alcohol concentration is an element of the crime (PAC)[1] and serves as statutorily relevant or prima facie evidence of an element of the crime (OWI).[2] In these cases, PBT results are not deemed reliable for purposes of confirming or dispelling a defendant's specific alcohol concentration and thus are not admissible at trial to prove or disprove the defendant's alcohol concentration, even though PBT results are admissible at the probable cause hearing. Wis. Stat. § 343.303; *State v. Faust*, 2004 WI 99, ¶26, 274 Wis. 2d 183, 682 N.W.2d 371. PBT results are utilized preliminarily for the purpose of determining whether a suspected drunk

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[1] In order to find a defendant guilty of operating with a prohibited alcohol concentration in violation of Wis. Stat. § 346.63(1)(b), the State must prove beyond a reasonable doubt that the defendant (1) operated a motor vehicle and (2) had a prohibited alcohol concentration at the time he operated the motor vehicle. Wis JI – Criminal 2660. "Prohibited alcohol concentration" is defined as "an alcohol concentration of 0.08 or more" if the defendant "has 2 or fewer prior convictions, suspensions, or revocations, as counted under s. 343.307(1)." Wis. Stat. § 340.01(46m)(a).

[2] In order to find a defendant guilty of operating while under the influence of an intoxicant in violation of Wis. Stat. § 346.63(1)(a), the State must prove beyond a reasonable doubt that the defendant (1) operated a motor vehicle and (2) was under the influence of an intoxicant at the time he operated the motor vehicle. Wis JI – Criminal 2663. "[A]n alcohol concentration of more than 0.04 but less than 0.08 is relevant evidence on the issue of intoxication," Wis. Stat. § 885.235(1g)(b), and "an alcohol concentration of 0.08 or more is prima facie evidence" that the defendant was under the influence of an intoxicant, Wis. Stat. § 885.235(1g)(c).

driver should be arrested and required to submit to further chemical testing. *See County of Jefferson v. Renz,* 231 Wis. 2d 293, 313, 603 N.W.2d 541 (1999) ("[T]he language that the legislature chose to describe the test confirms that it intended the PBT to function as a screening tool to be used prior to arrest. . . . [W]hen it described the test as 'preliminary,' the legislature clearly indicated that it intended the test to be a preparation for something else. It seems obvious that something else – the main matter – is the arrest itself."). Unlike the PBT, such chemical testing is subject to certain safeguards to ensure reliability.

¶39 Essentially, Fischer's argument is that the statutory prohibition of PBT evidence is unconstitutional. Since the plain language of the statute precludes admissibility in the case at issue, Fischer would have the burden to prove the statute unconstitutional beyond a reasonable doubt. Simply stated, Fischer has not met that burden.

¶40 What is good for the goose is good for the gander. Just as the defense should not be allowed to admit PBT results in an underlying OWI or PAC trial, the State should not be able to rely on those test results either. Merely because an expert may opine that he or she relied upon PBT results in order to form an opinion does not render the underlying test results admissible. As we have seen in other scenarios, an expert's opinion does not transform inadmissible evidence into admissible evidence. For example, if an expert were to review polygraph test results or voice stress analysis test results to form a

basis for an opinion, would the court allow those underlying test results to come in at trial when they are otherwise precluded? *See* Wis. Stat. § 905.065; *State v. Davis,* 2008 WI 71, ¶20, 310 Wis. 2d 583, 751 N.W.2d 332; *State v. Shomberg,* 2006 WI 9, ¶39, 288 Wis. 2d 1, 709 N.W.2d 370 (citing *State v. Dean,* 103 Wis. 2d 228, 278-79, 307 N.W.2d 628 (1981)). In other words, otherwise inadmissible evidence is not automatically admissible simply because a party can find an expert who says that he or she relied upon that evidence in forming an opinion. In addition, to allow an expert to so opine without introducing the underlying data would tie the opposing party's hands with respect to cross-examination. The judge, as gatekeeper, has the capacity to determine whether certain evidence is admissible and whether certain expert testimony assists the jury in its determination, and PBT results have not been admissible in OWI or PAC trials. Here, admitting PBT results can serve only to confuse the jury and undermine the presumption of accuracy afforded to chemical tests like the Intoxilyzer. *See State v. Busch,* 217 Wis. 2d 429, 443, 576 N.W.2d 904 (1998) (explaining that approved quantitative breath alcohol test instruments, like the Intoxilyzer, are recognized methods of testing authorized by statute and are thus entitled to a prima facie presumption of accuracy); Wis. Admin. Code § TRANS 311.04 (May 1997); Wis JI – Criminal 230, 232 (When an approved testing device is involved, the jury is instructed that "[t]he law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an

individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.").

¶41 To admit PBT results in an OWI or PAC trial would unravel the presumption that currently exists with respect to the accuracy of the PBT and create a whole new burden of proof for the State. "The PBT device has not been approved by the [Department of Transportation (DOT)] and does not receive a prima facie presumption of accuracy to establish a defendant's blood alcohol level." *Doerr*, 229 Wis. 2d at 624-25 (explaining that because of the DOT's evaluation and approval, the legislature has determined that some breath test instruments are entitled to a prima facie presumption of accuracy; the PBT, however, is not included in the DOT's list of approved instruments and consequently has a limited evidentiary use in motor vehicle proceedings). Admitting PBT results at trial would erode the presumption and lead the jury to confusion rather than clarification when it comes to chemical test results. The legislature recognized that danger when it determined that in this type of trial, PBT results are not admissible to prove a specific level of alcohol concentration.

¶42 As a result, I conclude that the legislature has spoken, and PBT results are not admissible in an OWI or PAC trial for the purpose of confirming or dispelling a specific alcohol concentration. Even if an

expert were to rely upon PBT results to form the basis of an opinion, the test results are still unreliable and inadmissible for the purpose offered in the case at issue. I agree with the majority, however, that this prohibition does not preclude the defense from offering an absorption curve defense. *See* majority op., ¶6. Still, just as I would not allow the State to introduce this PBT evidence at trial, the defense is precluded from offering an absorption curve defense based upon PBT results. Accordingly, I would conclude as a matter of law that an expert cannot reasonably rely upon PBT results to form an opinion in an OWI or PAC trial.

¶43 For the foregoing reasons, I respectfully concur.

¶44 I am authorized to state that Justices PATIENCE DRAKE ROGGENSACK and MICHAEL J. GABLEMAN join this concurrence.

COURT OF APPEALS DECISION DATED AND FILED

September 10, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP1898-CR **Cir. Ct. No. 2005CM123**

STATE OF WISCONSIN IN COURT OF APPEALS DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RICHARD M. FISCHER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed.*

Before BROWN, C.J., ANDERSON, P.J., and SNYDER, J.

¶1 BROWN, C.J.[1] WISCONSIN STAT. § 343.303 bars admitting the results of a Preliminary Breath Test (PBT) in drunk driving trials. Nonetheless, Richard M. Fischer sought to admit the testimony of his expert, who would tell the jury that he compared the blood test result with the PBT result and, by doing so, could extrapolate a probable blood alcohol concentration at the time Fischer was last seen operating his vehicle, about thirty minutes before the PBT was administered. Fischer claimed that he was constitutionally entitled to present this expert's analysis as an integral part of his defense. But the trial court, relying on the statute, refused to allow the expert to testify. The jury found Fischer guilty and he appeals, claiming that the trial court's reliance on the statute was arbitrary and disproportionate to the statute's purposes. We disagree. The legislature decided to prohibit admission of PBTs because they are not tested for accuracy at the time the PBT is administered. Prohibiting their use in this OWI trial is in accord with the legislative intent. We affirm.

BACKGROUND

¶2 The facts are brief and undisputed. At approximately 1:40 a.m. on January 29, 2005, Fischer was pulled over by a Village of Thiensville police

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[1] This case was converted from a one-judge appeal to a three-judge appeal pursuant to WIS. STAT. RULE 809.41(3) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

officer on suspicion of driving while intoxicated. The officer asked Fischer to perform field sobriety tests, which Fischer failed, and then administered a PBT. The PBT, taken about a half hour after Fischer was stopped, showed a breath alcohol concentration of .112 percent. Fischer was then arrested for OWI and taken to a local hospital for an evidentiary chemical blood test. The blood was drawn at 2:48 a.m. and the test result showed a .147 percent BAC. The State charged Fischer with OWI and PAC, both as second offenses. Fischer pled not guilty to the charges and the matter was set for trial.

¶3 Fischer retained an expert witness, Dr. John Steele, who prepared a report regarding Fischer's BAC at the time he was driving. Dr. Steele relied on both the PBT and blood test data and opined that at approximately 1:40 a.m., when Fischer was first stopped, his BAC "may have been below 0.08%." The State filed a motion to exclude Dr. Steele's report and professional opinion because it relied, in part, on the PBT result, which is inadmissible in prosecutions for OWI under WIS. STAT. § 343.303. Fischer subsequently offered a revised report wherein Dr. Steele clarified that "the breath test was a contributory datum, but it is the interplay and dynamic relationships between the breath test and the blood test rather than either one alone which support my inferences." On August 24, 2006, the court held a hearing on the State's motion to exclude Dr. Steele's reports and testimony.

¶4 At the hearing, the State argued that Dr. Steele's testimony should not be allowed because the opinion was based in part on a PBT result that was not tested for accuracy. To illustrate its point, the State compared the Intoximeter with the PBT. We think it is important to cite the prosecutor's statement in pertinent part because it is important to the ultimate rationale of this opinion.[2]

> The Intoximeter, as the Court can I think take judicial notice of, has certain procedures that are involved in the testing procedure. There is a 20-minute waiting period to insure that there is no mouth alcohol or other things going on. There is a two-test procedure. The two breath samples from the subject have to be within a certain quantitative number. They have to be taken within a certain time frame. There are air blank tests within the testing procedure at different points. There is a control sample within that procedure that must meet a certain quantitative number or within a certain quantitative number in order for the test to be valid. And there is a certain amount of air that must be blown into that machine, usually testified to as you have to have the tone there before you have given enough air. And of course we have seen cases where

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[2] We realize, of course, that Fischer was given a blood test, not an Intoximeter test. A blood test, though, is also a quantitative test, and is administered by medical professionals.

> there is a deficient sample, not enough air has been blown into it.
>
> The other side then is the PBT, which doesn't have the waiting period, has only one test, has no control sample, has no blank air test, and doesn't require any type of minimum "amount of" blow. You blow into it, it reads whatever you blow into it, however much that is. The difference here . . . is the deep lung air comes out in the Intoximeter, where with a PBT, you don't know that because . . . you might get it if somebody blows long enough, but you may not. So there is a very big difference between the two tests.
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> Then when you look at the Administrative Code . . . the Department of Transportation Trans 311.10, there is [sic] two different types of tests in there. There is a quantitative test . . . and a qualitative test. . . . The quantitative test is the Intoxilyzer and those types of devices. The qualitative tests are the PBT tests.

From this, the State argued that the reason the legislature did not want PBTs used in court is because these qualitative tests were not deemed to be reliable enough to be admissible.

¶5 Fischer's attorney, for her part, argued that Fischer had a Sixth Amendment right to present this expert testimony and that the State's arguments simply went to the weight of the evidence, which the jury could consider.

¶6 The trial court reasoned that the legislature deemed the PBT to be reliable enough for probable cause, but not reliable enough to be admitted into evidence for the purposes of determining guilt or innocence. The court candidly admitted that it was not sure what the exact legislative history was, but surmised that because of its "inherent unreliability and the way it's used it's really kind of a dirty, a quick and easy test that police officers can administer on the street." The court also commented that if police administered the PBT and the driver was not recorded as being under the influence, the driver could be on his or her way, and the intrusion in the driver's life would be minimal. To this end, the court concluded that the legislature never "contemplated that [the PBT] would be an evidentiary test." The court determined, therefore, that the statute was not unconstitutional as applied to Fischer and granted the State's motion. A jury trial took place and Fischer was convicted on both the OWI and PAC charges.

¶7 The United States Supreme Court has set forth the following test to determine when a state's rules excluding defense evidence abridge an accused's right to present a defense. There is no abridgement of the accused's right to present a defense so long as the rule of evidence is "not 'arbitrary' " or "disproportionate to the purposes [the rule] is designed to serve." ***United States v. Scheffer***, 523 U.S. 303, 308 (1998) (citation omitted). A rule is "unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused." ***Id.***

The "weighty interest" means the "fundamental elements" of the accused's defense. *See* ***id.*** at 315. The circuit court's decision on a procedural issue at trial may nominally be labeled discretionary, but the court's authority may not be exercised until it accommodates the accused's due process rights to present a defense. Appellate courts are therefore duty-bound to determine as a matter of law whether the defendant has been denied his or her constitutional right to present a defense in issues such as this. ***State v. St. George***, 2002 WI 50, ¶49, 252 Wis. 2d 499, 643 N.W.2d 777. Thus, this court must review the issue de novo.

¶8 In ***Rock v. Arkansas***, 483 U.S. 44, 55-56 (1987), the United States Supreme Court held that a court may not rely on a statute mechanistically, but must be measured against a proportionality test, balancing the restriction on the right to present a defense against "the purposes they are designed to serve." Our supreme court offered guidance on how to apply this balancing test in ***St. George***. It is a two-part inquiry. ***St. George***, 252 Wis. 2d 50, ¶53. First, the defendant must satisfy *each* of the following four factors through an offer of proof: (1) The offered testimony meets the standards of WIS. STAT. § 907.02 governing admission of expert testimony;[3] (2) The

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[3] WISCONSIN STAT. § 907.02 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training,

(Continued on following page)

expert's testimony must be clearly relevant to a material issue in this case; (3) The expert witness's testimony is necessary to the defendant's case; (4) The probative value of the expert witness's testimony outweighs its prejudicial effect. ***Id.***, ¶54.

¶9 If the defendant successfully satisfies these four factors to establish a constitutional right to present the proffered evidence, a court undertakes the second part of the inquiry by determining whether the defendant's right to present a defense is nonetheless outweighed by the State's compelling interest to exclude the evidence. ***Id.***, ¶55.

¶10 We will discuss the second and third factors first, because they are, in our view, easily decided. We are convinced that Fischer has satisfactorily shown how Dr. Steele's analysis is relevant to the issue at hand. The issue, after all, is whether he was intoxicated at the time he was driving. If a jury were to hear Dr. Steele's opinion that Fischer, in all probability, was under .08 percent at the time he was driving, the opinion would cast light upon the subject of the inquiry. *See* ***Zdiarstek v. State***, 53 Wis. 2d 420, 428, 192 N.W.2d 833, (1972). So, Fischer has met the second factor.

¶11 We also are convinced that Dr. Steele's analysis was necessary for his defense. The blood test

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or education, may testify thereto in the form of an opinion or otherwise."

showed him to be well over the limit. He had failed the field sobriety tests. He had to show the jury, somehow, that before the field sobriety tests, he was okay to drive. Thus, Fischer has also met the third factor in the inquiry.[4]

¶12 This leaves the first and fourth factors. We will assume, for the moment, that Dr. Steele's testimony also meets WIS. STAT. § 907.02 on the basis that his scientific expertise would assist the trier of fact in deciding an issue. Similarly, we will assume, again for the moment, that his testimony has "probative value" and, as such, outweighs any prejudicial

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[4] Although the trial court did not address the issue by going through each factor set forth in ***State v. St. George***, 2002 WI 50, ¶ 49, 252 Wis. 2d 499, 643 N.W.2d 777, and although it did not grant the State's motion based on any particular failure in meeting the ***St. George*** test, it did comment that the defendant was not without recourse if he wanted to pursue an absorption curve analysis defense. The trial court observed that Fischer could have asked for an alternate test on the night in question in addition to the blood test, and the arresting authorities would have been duty-bound to administer it. The trial court implied that the expert would have been able to compare the result of the blood test at the time that it was taken, the result of the alternate test at the time that test was taken and do an analysis that way. The problem with this rationale is that there *was no* alternative test conducted. The rationale suggests that, by not requesting an alternative test after arrest, a defendant waives his or her right to have a lawyer seek an expert opinion using the historical facts that *did* in fact occur. Lawyers, not defendants, waive arguments and opportunities to present evidence based on the facts that are present. We are at a loss to find any law supporting the trial court's rationale.

effect. But it is just for the moment. We will return to these two factors soon.

¶13 We jump to the second part of the analysis – whether Fischer's right to present the proffered evidence is nonetheless outweighed by the State's compelling interest to exclude the evidence. As the supreme court said in ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 312-16, 603 N.W.2d 541 (1999), the legislature intended the PBT to function as a preliminary screening tool, to be used by an officer during investigation of a person suspected of an OWI violation. As the court noted in ***Renz***, the legislature used the word "preliminary" for a specific reason: to denote that the PBT is "a preparation for something else." ***Id.*** at 313. That something else is "probable cause." Inherent in WIS. STAT. § 343.303, then, is the legislature's decision that PBT results are sufficient information to determine only whether an officer has probable cause to arrest. But, it appears that the legislature has also determined that the results are not sufficiently reliable for jury consideration in determining guilt or innocence.

¶14 Unlike the Intoximeter, the PBT is not tested for accuracy either immediately before or after a test. The intoximeter is a "quantitative" test and the PBT is a "qualitative" test. These words alone suggest a world of difference between the two. WISCONSIN ADMIN. CODE § TRANS 311.03(13) defines a *quantitative* breath alcohol analysis as "a chemical test of a person's breath which yields a specific result in grams of alcohol per 210 liters of breath." In

contrast, § TRANS 311.03(12), defines a *qualitative* breath alcohol analysis as "a test of a person's breath, the results of which indicate the presence or absence of alcohol."

¶15 Clearly, the former test calls for an accurate "measurement" that is, after all, the definition of the word "quantitative" – something "involving the measurement of quantity or amount." WEBSTER'S THIRD NEW INT'L DICTIONARY 1859 (3d ed. 1993). A qualitative analysis, as any chemistry major would know, merely determines the constituents of a substance without any regard to the quantity of each. ***Id.*** at 1858. Thus, as succinctly defined in the administrative code, the qualitative breath test is for the purpose of determining only whether alcohol is present or not.

¶16 Fischer points to WIS. ADMIN. CODE § TRANS 311.10(2), which tells how a qualitative test, such as the PBT, must be tested for accuracy. And it is true that the code explains that each instrument is "checked" by an individual holding a valid permit to operate it, that the check must be conducted at regular intervals and, in so doing, the permit holder must use a calibrated unit which has the approval of the DOT's transportation section. ***Id.*** But this code provision does not mean that the PBT is tested for accuracy at the time the test is administered. Nor does it mean that the exact quantity of alcohol in the breath at the time the PBT is administered is capable of being measured. All the code does is set up a procedure for determining whether the device is

capable of detecting the presence or absence of alcohol to a degree credible enough that the law enforcement officer on the street can trust it in his or her determination of probable cause.

¶17 Therefore, the testing mechanism for the PBT is simply not designed so the result obtained during the investigation of a possibly intoxicated driver is accurate enough that it can be used to help a jury determine the driver's guilt or innocence. The legislature did not want the PBT admitted as evidence for that reason. The reason applies whether it is the State that wants to use the PBT results or the defendant who wants to use it. We conclude that the State's interest in not allowing PBT evidence in the courtroom in OWI trials is legitimate and overrides Fischer's interest in presenting Dr. Steele's testimony.

¶18 Fischer asserts that it does not matter whether the legislature meant for the PBT to be a screening device or whether it can be tested before and after use. In his view, the fact that it cannot be tested for measurement does not answer the question of whether the State has a legitimate interest in preventing the use of PBT evidence in his case. He cites WIS. STAT. § 907.03, which he claims is the correct answer to the question of whether the State has a legitimate reason to apply the generic statute to his case. This statute reads:

> **Bases of opinion testimony by experts.** The facts or data in the particular case upon which an expert bases an opinion or

> inference may be those perceived by or made known to the expert at or before the hearing. If of a type *reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject,* the facts or data need not be admissible in evidence.

Sec. 907.03 (emphasis added).

¶19 Fischer cites three sources to argue that the PBT is an instrument reasonably relied upon by experts in Dr. Steele's field: (1) cases from other jurisdictions where appellate courts have allowed experts to give an opinion based on a PBT result, (2) a DOT article trumpeting its use, and (3) Dr. Steele's own qualifications as an expert in the methodology of science and the validation of instrumental techniques. For this reason, Fischer contends that Dr. Steele's opinion is admissible under WIS. STAT. § 907.03, and the question of whether Dr. Steele's opinion is reliable is for the jury to determine. Thus, he claims, the State has no legitimate interest in applying the general PBT statute because the State may cross-examine and argue to the jury that Dr. Steele's opinion is unreliable since the PBT is not tested for accuracy.

¶20 First, we must state the obvious. If, as Fischer concedes, our United States Supreme Court has declared that states have broad latitude under the U.S. Constitution to establish rules excluding evidence from criminal trials, and if a state has made such an exclusion, then allowing defendants to admit the excluded evidence just because the State could

cross-examine or offer contrary evidence would emasculate the exclusion. To buy into what Fischer argues, we would have to conclude that any rule excluding evidence takes a back seat to a defendant's desire to admit such evidence, just because the State could rebut the evidence if it wished. That cannot be the law.

¶21 Second, the issue is not the "reliability" of Dr. Steele's opinion, but the "validity" of his opinion. There is a distinct difference between "reliability" and "validity." While "reliability" determinations are for the jury under Wisconsin law, "validity" questions are for the circuit court in its limited gate-keeper capacity. To illustrate the difference, consider that a person's bathroom scale may repeatedly record the same weight for a person every morning – give or take a pound, either way. That person may believe the scale and think it is reliable – based on repeated experience with it. But what if the scale is off – say five pounds off – and the person owning the scale does not know it? The results may be reliable as far as that person is concerned, but that does not make the results valid.

¶22 Similarly, Dr. Steele can compare the PBT result with a blood test result 100 times and be convinced as to the reliability of his absorption curve analysis. But is his analysis valid? We must answer the question "no" because Fischer's PBT result is not an empirically tested measurement. The PBT result in Fischer's case may have been 100% accurate or it may have been 100% inaccurate. It may have been a

little off or it may have been way off. We do not know. And neither does Dr. Steele. The problem, however, is that Dr. Steele is offering an opinion of nonintoxication based on a test – a test that he is asking the jury to assume to be bona fide measurement, but whose result is, in fact, unfalsifiable because it cannot be measured at the time of the test.

¶23 Why allow an expert, one with a science background, to rely on a test whose accuracy at the time of the test cannot be authenticated as a foundation for an opinion? That makes no sense. Do scientists in Dr. Steele's field, or any other scientific field for that matter, reasonably rely on data that is not designed to be empirically measured with exact accuracy at the time of the test? We have no evidence that this is so. Therefore, we conclude that WIS. STAT. § 907.03 has no application to this case.[5]

¶24 That brings us back to the two remaining factors in the ***St. George*** analysis that we momentarily assumed were present – whether the expert witness met the standards of WIS. STAT. § 907.02 and whether the probative value of the testimony of the defendant's expert witness outweighs its prejudicial effect. Section 907.02 asks whether the scientific or specialized knowledge of the proposed expert will

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[5] This is not to say that qualitative tests are always invalid. There are many qualitative types of evidence whose foundations have been shown to be valid, *e.g.*, battered women's syndrome. We limit our discussion to the qualitative test conducted in this case.

assist the trier of fact to understand the evidence of a fact in issue. We are convinced that if the underlying basis for the opinion is a result that cannot be tested for accuracy at the time of the test, then it cannot assist the trier of fact. Similarly, such an opinion has no probative value, but is an opinion built much like a house of cards. If the foundation breaks down, the house breaks down. We affirm the trial court's ruling excluding Dr. Steele's opinion.

By the Court. – Judgment affirmed.

Recommended for publication in the official reports.